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IN THE

Supreme Court of the United States

OCTOBER TERM — 1970

No. 1526

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner,

vs.

AUBURNDALE FREEZER CORPORATION,
MINUTE MAID COMPANY, AND
NATIONAL LABOR RELATIONS BOARD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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The decision and order of the National Labor Relations Board, 177 NLRB No. 108, 71 LRRM 1503, is reproduced in the Appendix of the Petition, pages 17-39. The opinion of the Court of Appeals is reported at ____ F.2d ____, 75 LRRM 2752, and is reproduced in the Appendix of the Petition, pages 1-16.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Can a union, engaged in a dispute with a primary employer and successful in shutting down the primary employer's plant, lawfully extend its picketing to an independently owned and separately located warehouse where there is stored a small portion of the primary employer's product?

STATEMENT OF THE CASE

Cypress Garden Citrus Products, Inc. (hereinafter "Cypress") is engaged in the business of processing citrus fruits and products (A. 47).[1] Cypress has a plant which is its principal place of business at Eloise, Florida (A. 47).

Respondent, Auburndale Freezer Corp., (hereinafter "Auburndale") is the sole owner of a public cold storage warehouse located in Auburndale, Florida, approximately five to six miles from Cypress' plant (A. 45, 84). Auburndale has only three employees—a general manager, an office secretary and a maintenance man. (A. 72, 73).

Auburndale has a contract with Respondent Minute Maid which provides that 30 employees of Minute Maid will perform work of unloading deliveries at the Auburndale warehouse, furnishing bills of lading, placing the contents in storage and servicing outgoing shipments on freight cars and trucks (A. 46). Those employees work under the direction of Minute Maid's superintendent, who, in turn, takes his instructions from Auburndale's general manager (A. 101).

When a truck loaded with citrus products arrives at the unloading platform, Minute Maid employees,

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[1] As used herein, "A" refers to the Appendix in the Court below.

using a fork lift, drive on to the customer's truck, remove the product and place it in storage. The driver of the truck performs no work while at the warehouse premises. The driver customarily sits in the cab until the unloading is finished at which time he is given a receipt for the product (A. 77).

Cypress is one of some 20 depositors who store goods at the warehouse facility (A. 95). Cypress has stored goods at Auburndale since 1956 (A. 87). Pursuant to a five year written contract entered into in January 1967, Auburndale guarantees Cypress sufficient storage area for 300,000 cases of citrus concentrate (approximately 10% of the Auburndale storage space) (A. 74). No portion of the warehouse is set aside under this contract for Cypress' stored products (A. 75).

In addition to the case concentrate, Cypress stores drum concentrate at Auburndale which is occasionally returned to Cypress for further processing. However, the General Manager of Auburndale testified that none had been returned during 1967 (A. 78, 79).

Cypress also stores citrus products on its own premises and at other cold storage warehouses (A. 94, 95). Auburndale's General Manager testified that in his opinion the Cypress storage at Auburndale's warehouse constituted a minute part of Cypress' overall business operation (A. 98).

On October 15, 1967, after a breakdown in bargaining negotiations, Local 6991, United Steelworkers of America, AFL-CIO, struck Cypress (A. 48, 49, 66). Two days later, about 15 striking Cypress employees began picketing at the premises of the Auburndale warehouse facility (A. 49, 82). At the time of the picketing,

Cypress' products occupied approximately 5% of the total warehouse space (A. 94).

The picketing took place at the only truck entrance to the warehouse as well as at a point where the railroad siding entered the premises some 400 to 500 feet away (A. 82, 111).[2]

On the first day of picketing, Auburndale's General Manager went to the picket line and asked the pickets why they were picketing Auburndale. A female picket stated: "Well, you got our product in there." (A. 83).

The picketing generally took place at the times when the Auburndale and the Minute Maid employees were working on the warehouse premises. As soon as their activity ceased at the warehouse the pickets would leave (A. 97). At no time during the picketing did any Cypress trucks or employees come to the warehouse for the pickup or delivery of citrus products (A. 86). There was also no evidence in the record of any shipments of Cypress' citrus products by truck or by rail during the picketing.

The picketing lasted until approximately November 6 or 7, 1967, at which time the pickets were removed pursuant to an agreement between the General Counsel and the Steelworkers' attorney to abstain from picketing pending resolution of the unfair labor practice charges before the Board (A. 26, 66).

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[2] The picket signs used read, "Employees of Cypress Gardens Citrus Products are ON STRIKE. We have no dispute with any other employer. United Steelworkers of America, Local 6991, AFL-CIO." The words "ON STRIKE" were in large letters whereas the remainder of the wording on the picket signs was in much smaller letters. Auburndale's Vice President and General Manager testified that you had to get, "right up close to read any of the other" letters (A. 95, 96).

Respondents Auburndale and Minute Maid separately filed unfair labor practice charges against the Union. The General Counsel consolidated the cases and issued a complaint that the Union had engaged in picketing with the object of forcing and requiring Auburndale, Minute Maid and others to cease using, selling, handling, transporting or otherwise dealing in the products of and to cease doing business with Cypress, contrary to Section 8(b)(4) of the Labor Management Relations Act of 1947, 29 USC §158 (b)(4).[3]

Pursuant to a hearing held in due course, the Trial Examiner concluded that the picketing was unlawful under the secondary boycott provisions of Section 8(b)(4)(i)(ii)(B) of the Act. Upon exceptions to the Trial Examiner's Decision, the case was heard by all members of the National Labor Relations Board.

A majority of the Board [3-2] disagreed with the Trial Examiner. Over the sharp dissent of Chairman McCulloch and Member Brown, the Board held that picketing at Auburndale, an unconcerned neutral employer, was legal. The rationale of the Board was that Cypress, the primary employer, had "sufficient presence" at the warehouse (App. of Petition, 20, 21). The Board held that Cypress' activities at Auburndale constituted an integral part of the Cypress production process and that the warehouse "to the extent that [it] is a part of the Cypress operation" constituted a *common situs* (App. of Petition, 22). The Board then concluded that since the picketing was in accord with the *Moore Dry Dock* requirements, it constituted legitimate common situs picketing (App. of Petition, 22).

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[3] The relevant portion of Section 8(b)(4) is quoted at App. of Petition, page 1, n.1.

The Board's majority then added that even if the *Moore Dry Dock* standards were not met, the picketing would constitute primary action. As authority for this statement, the Board cited in a footnote, *General Electric* and *Carrier,* but never discussed or analyzed the principles of those cases (App. of Petition, 23).

Respondents Auburndale and Minute Maid petitioned for review of the Board's decision. The Fifth Circuit Court of Appeals held that the picketing was secondary and therefore unlawful. The Circuit Court rejected the Board's approach and recognized ". . . that this case may not be decided on strained or ephemeral extensions or constructions of *situs,* applied out of context." (App. of Petition, 6). The Court properly reviewed the statutory language of §8(b)(4) and noted that the Union's object was the key consideration in determining the legality of the picketing (App. of Petition, 6). With regard to the legality of picketing five or six miles from the struck plant at a public warehouse where there is stored a small portion of the struck employer's goods, the Court found that "There is no rational basis in this record upon which reasonable men might differ as to the facts." (App. of Petition, 7). The Court then found that the inescapable purpose of the picketing was to halt the operation of other employers who were entitled to use not less than 90% of the space and who were total strangers to the whole controversy (App. of Petition, 7).

ARGUMENT

I. THERE IS NOT AN IMPORTANT QUESTION OF FEDERAL LAW

Petitioner insists that there is implicit in the prohibition by the Fifth Circuit Court of Appeals of a Union's picketing of a secondary neutral employer's premises wherein there is stored a small portion of the primary employer's goods, an important question of federal law which this Court should decide.

The Petitioner asserts, without reference to any portion of the opinion below, that the opinion is grounded upon the premise that all picketing directed solely at neutral employers is unlawful. A careful reading of the Court's opinion makes clear that its holding is based on the particular facts of this case rather than on an assumption which Petitioner imagines is present.

Petitioner next asserts that an important federal question must be present because of the economic impact of the Court's decision, citing the *amicus curiae* brief filed by the American Warehousemen's Association wherein it was noted that in excess of $50,000,000,000 annually of the United States' gross national product is handled through warehouses similar to Auburndale Freezer. It is true that the decision of the National Labor Relations Board had a very substantial, potential impact on the American economy by permitting any warehouse to be picketed if a customer of the warehouse is engaged in a labor dispute. The Fifth Circuit noted the effect of the Board's ruling and the resulting question before the Court by stating:

> "This case is of supreme public importance." (App. of Petition, 5).

The Court then noted the specific reasons why the case, as it stood before the Court, was of "supreme public importance":

> "The inescapable effect of the Board decision would be to inject a public warehouse operator and other employers who use his facilities into the labor disputes of all customers. A public warehouse could be subject to picketing at any time a labor organization engages in a dispute with any employer who happens to be a customer of the warehouse. The impact on the general welfare could be especially critical in those instances where, as here, perishable food products intended for human consumption are substantially involved." (App. of Petition, 5, 6).

The Court then reversed the Board's decision, thus eliminating the economic impact of the picketing and the potential effect of the picketing on the nation's food supply and general economy. Therefore, as a result of the Fifth Circuit's reversal of the Board decision, the case is no longer of "supreme public importance".

On this same question, it must be noted that the National Labor Relations Board, the agency initially charged with the application and enforcement of the nation's labor laws and policy, has not seen fit to independently seek a petition for a writ of certiorari, nor has the Board joined the Petitioner in seeking the instant writ. This would imply that the Board does not consider the case, in its current posture, to be one of "supreme public importance".

It would appear that the Petitioner, in seeking to invoke this Court's jurisdiction, has disregarded the words of Chief Justice Taft in *Magnum v. Coty,* 262 U.S. 159, 163 (1923):

"The jurisdiction of the Supreme Court to review cases by way of certiorari *was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing.*" (Emphasis supplied)

II. THERE IS NO CONFLICTING DECISION

At the outset, it must be recognized that what the Petitioner seeks is the right to picket a product of a struck employer, wherever it may be located.

In concluding that the Fifth Circuit's opinion in the instant case is in conflict with the principles enunciated in prior decisions of this Court, the Petitioner relies directly upon the decisions in *Local 761, International Union of Electrical Workers* v. *NLRB* (General Electric Co.),[4] 366 U.S. 667 (1961) and *United Steelworkers of America v. NLRB* (Carrier Corp.),[5] 376 U.S. 492 (1964).

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[4] In *General Electric,* the Union picketed at a separate gate located on the *primary employer's premises* but used exclusively by the subcontractors of the primary employer. This Court held that if the work performed by the employees using the gate (secondary employees) was related to the day-to-day operation of the primary employer's plant, then picketing of the gate was legal because it was primary activity. In fact, in the *Carrier* case, which relied upon *General Electric,* the Court at page 497 of the opinion, noted that *General Electric* stood for the proposition that picketing was *not* to be protected simply because it occurred at the site of the primary employer's premises. Thus, the effect of the Court's ruling was to prohibit certain picketing by the union on the primary employer's property.

[5] In *Carrier,* the Union picketed a gate located in a chain link fence which surrounded the primary's and the railroad's property. In fact, Carrier had deeded the right-of-way in question to the railroad. The specific issue before the Court, as stated by Justice White at page 493 of the opinion, was the legality of picketing an entrance, used exclusively by railroad personnel, to a railroad spur track located on a right-of-way owned by the railroad and adjacent to the struck employer's premises.

In *General Electric* this Court placed certain limitations on *primary* picketing which occurred on the primary employer's property. Here, the Petitioner seeks to make legal *secondary* picketing which occurs off of and several miles away from the primary employer's (Cypress') premises.

While Petitioner asserts that the Fifth Circuit's decision conflicts with the principles announced by this Court in *Carrier,* it ignores the obvious differences between the instant case and the prior decisions of this Court. As noted, one of the primary distinctions is the locus of the picketing. Based on *Carrier,* Respondent concedes that there are certain limited situations in which picketing can legally take place on property owned by one other than the primary employer. However, *for purposes of the picketing,* this Court in *Carrier* considered the railroad's right-of-way as property of the primary employer.

In *Carrier* the Court noted two factors of particular significance to the instant case. First, "There was no other place where the union could have brought home to railroad workers servicing Carrier its dispute with Carrier." 376 U.S. 492 at 500. In the case at bar, the primary struck employer warehoused a portion of its product at its own warehouse (A. 68, 94). Obviously, there was an opportunity for the Petitioner to appeal to common carriers when the carriers arrived at the cold storage warehouse located on the premises of the primary employer. Thus, contrary to the situation in *Carrier,* where there was no other place where the union could have brought home to the railroad workers its labor dispute, the Petitioner had every opportunity, by picketing the premises of the primary, to publicize its dispute to common carriers.

Secondly, the Court noted that the picketing in *Carrier* was, for the purposes of Section 8(b)(4), legitimate primary picketing because the situs of the picketing was proximate to the premises of the struck employer. This necessarily relates to the prior finding that, absent the right on the part of the union in *Carrier,* there would have been no opportunity for the union to appeal to common carrier employees. In the current situation, the Respondent, Auburndale Freezer, is located five or six miles (A. 84) from the premises of the primary employer. Thus the "proximateness" considered to be of singular significance by this Court in the statement of the issue and the holding in *Carrier* is absent in the present case.

Petitioner's asserted conflict with the principles of *General Electric* and *Carrier* also overlooks the fact that decisions subsequent to *General Electric* and *Carrier* have narrowly construed the principles enunciated in those cases. In *Building and Construction Trades Council of New Orleans, AFL-CIO and Markwell and Hartz, Inc.,*[6] 155 NLRB 319 (1965), the Board refused to extend the rationale of *General Electric* and *Carrier* to a common situs. In so holding, the Board, at page 325 of its opinion, noted:

> "Nor do the Supreme Court's decisions in *General Electric* and *Carrier* detract from our opinion

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[6] In *Markwell and Hartz,* the primary struck employer was a general contractor. The situs of the work was a construction project on property owned by a third party. The primary had subcontracted a portion of his work to subcontractors, as is customary in the construction business. When the union picketed Markwell and Hartz, Markwell and Hartz immediately established separate gates for the use of employees of the neutral subcontractors. The union continued to picket, including the picketing of gates reserved solely for the use of employees of neutral subcontractors. This led to the filing of charges by Markwell and Hartz and the eventual Board holding that the picketing of the reserved gates was in violation of 8(b)(4).

> in this regard; for, the mere fact that picketing of a neutral gate *at premises of a struck employer* may in proper circumstances be lawful primary action, does not require a like finding when a labor organization applies *direct* pressure upon secondary employers engaged on a common situs." (Board's emphasis)

The decision of the Board was enforced by the Fifth Circuit in *National Labor Relations Board* v. *Building and Construction Trades Council of New Orleans, AFL-CIO,* 387 F.2d 79 (5th Cir. 1967), and certiorari was denied by the Supreme Court, *Building and Construction Trades Council of New Orleans, AFL-CIO* v. *National Labor Relations Board,* 391 U.S. 904 (1968). The Board, with Fifth Circuit and Supreme Court approval, refused to extend *General Electric* and *Carrier* beyond the premises of the primary employer to a common situs. Certainly they are not to be extended to a *secondary* situs.

Petitioner contends that it has the right to appeal to secondary employees not to perform duties connected with the normal day-to-day operations of the struck employer. As support for this contention, Petitioner again cites *General Electric, supra, Carrier, supra,* and *Railroad Trainmen* v. *Jacksonville Terminal Co.,* 394 U.S. 369 (1969). As noted previously, the picketing in both *General Electric* and *Carrier,* for purposes of 8(b) (4), took place at the premises of the struck employer. The same is true with regard to *Jacksonville Terminal.* The struck employer was the Florida East Coast Railroad; the railroad was one of the four owners of the picketed Jacksonville Terminal. Thus, each of the cases relied upon by the Petitioner involved, for purposes of 8(b) (4), picketing at the struck employer's premises.

For purposes of argument, and ignoring the decisive factor that *General Electric, Carrier* and *Jacksonville*

Terminal dealt with picketing at or immediately adjacent to the property owned by the primary employer, the most accurate statement of what constitutes the "day-to-day operations of the struck employer" is found in the decision by Judge Blackmun (now Justice Blackmun) in *National Maritime Union of America, AFL-CIO* v. *National Labor Relations Board,*[7] 367 F.2d 171 (8th Cir. 1966); *cert. denied* 386 U.S. 959 (1967). In response to the union's claim that the services performed by Farmer and Twin City Barge employees were part of the day-to-day operations of Mid-American Transportation (MAT), Judge Blackmun said:

> "The concept of what is necessary to the day-to-day operations of MAT must have its limitations, too. Fuel, for example, is necessary in the operation of MAT's towboat. Picketing the towboat might well effect economic pressure on any fuel supplier whose delivering employees refuse to cross the picket line. That picketing, by the cases cited, would be legal primary picketing. However, if NMU were to picket the supplier's Kentucky coal mine or its Oklahoma refinery, that picketing, by the same cases, would be proscribed. Yet both situations concern the fuel which is necessary to MAT's daily operations. *The distinction lies in the situs.*" (Emphasis added)

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[7] In *National Maritime Union (NMU),* the union represented employees who worked on board barges and tow boats owned by Mid-American Transportation (MAT). MAT handled cargo on the Mississippi River between East St. Louis and the mooring area at Inver Grove, a few miles downriver from St. Paul, Minnesota. No MAT towboats go upriver beyond the Inver Grove area, nor were there any MAT employees on the barges when the barges were towed by independent contractors upriver from Inver Grove. Shortly after a strike against MAT began, the NMU picketed a MAT barge when it was being towed upriver by Twin City Barge, a company which regularly towed MAT barges upriver from Inver Grove. No MAT employees were present at the time. These, and other similar acts resulted in the filing of 8 (b) (4) charges with the National Labor Relations Board.

Thus, even though the barges were the normal situs of the employees' work, and even though the hauling, cleaning, loading and unloading of the barges were necessary to the daily operations of MAT, the picketing of MAT owned barges in the complete absence of MAT employees was unlawful because, in the words of Judge Blackmun, "The distinction lies in the situs."

In view of the obvious lack of conflict between *General Electric* and *Carrier,* particularly as these cases have been subsequently applied by the Board and the Circuit Courts, there are no grounds for the granting of certiorari on the basis of conflict.

III. LOWER COURT DECISION IS CONSISTENT WITH ESTABLISHED PRINCIPLES OF LAW.

To permit the Petitioner to picket the premises of Auburndale Freezer would destroy the long standing rationale of the "ally doctrine."[8] In order to prevent an employer from escaping the economic impact of a strike by subcontracting the struck employer's normal produc-

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[8] There are two recognized tests to determine if an employer is an ally of a struck employer and thus denied the protection of §8 (b) (4). The first test is whether the secondary employer is an ally of the struck employer to the extent that he cooperates with the struck employer by doing the struck employer's work so that he is no longer disinterested or neutral in the labor dispute, thereby forfeiting his privilege as a neutral. The second test is the so called "straight line operation" test. When the primary and secondary employers, although separate legal entities, are commonly owned or controlled or are engaged in closely integrated operations, they are to be regarded as a single employer under the Act and hence they are "allies" in, and parties to a union's dispute with the primary employer. However, for the purposes of "integrated activities", the two companies must be so integrated and so interdependent that they must be regarded as a single operation. See *Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union and Hershey Chocolate Corporation,* 153 NLRB 1051 (1965) at 1060, 1061.

tion work to independent contractors at the time the strike begins, the "ally doctrine" was developed.

Keeping in mind the long established business relationship between Cypress and Auburndale (A. 88), the Auburndale case is factually similar to *Warehouse Union Local 6, International Longshoremen's and Warehousemen's Union* and *Hershey Chocolate Company* (Hershey),[9] 153 NLRB 1051 (1965).

In *Hershey,* when the independent warehouse where Hershey stored its product was picketed, the Hershey Co. filed charges with the National Labor Relations Board charging a violation of 8(b) (4) of the Act. The union defended, claiming the warehouse was an ally of Hershey. The Board noted that the ally doctrine was an exception to the general prohibition of strike activity at the premises of a secondary employer. The Board in noting that the warehouse was not an ally found that Hershey was not performing struck work. The holding necessarily infers that the fact the warehouse was used for the storage of Hershey goods did not make it an integrated part of the primary's operation so as to make the warehouse an ally.

What the Petitioner asks this Court to do, in seeking certiorari, is to destroy the ally doctrine as it now exists by making *every* employer who performs the smallest task for a primary struck employer, an ally of the primary.

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[9] In *Hershey,* Hershey decided to close down its warehouse and store its product at an independent warehouse, Encinal Terminals. At the same time, Hershey was anticipating the construction of a new warehouse and manufacturing facility. The ILWU, as representative of the employees at Hershey's closed facility, demanded that the employees terminated as a result of the closing be hired at the new operation and that the union be recognized as the representative of the employees. Hershey refused, whereupon the union began picketing the Encinal Terminal where Hershey's goods were warehoused. A strike against Hershey subsequently developed.

CONCLUSION

For the reasons set forth hereinabove, certiorari should be denied.

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CERTIFICATE OF SERVICE

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